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Case No. 83-788

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE STATE OF FLORIDA,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

JERRY HILL
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TENTH JUDICIAL CIRCUIT

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EARL ENMUND

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STATEMENT OF THE CASE

Respondent, Earl Enmund, contends that the only facts relevant to this proceeding are those which have been carefully analized and presented in this Court's opinion in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982). He urges this Court to rely upon those for a determination of the issues in the Petition for Writ of Mandamus.

On pages 4 through 12 of the Petition for Writ of Mandamus, Petitioner contends that certain disputed evidence or differing inferences from the evidence is now relevant to establish the degree of Enmund's participation in the crime and his intent. These factual matters were litigated in the state trial court and the Supreme Court of Florida where the disputes were ultimately resolved. Enmund v. State, 399 So.2d 1362 (Fla. 1981). Consequently, the facts and inferences Petitioner discusses on those pages are irrelevant to these proceedings and should be disregarded.

REASONS FOR DENYING THE WRIT

THE SUPREME COURT OF FLORIDA CORRECTLY CONSTRUED AND APPLIED THE OPINION OF THIS COURT IN ENMUND v. FLORIDA.

Petitioner asserts that the Supreme Court of Florida misconstrued and misapplied this Court's opinion in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982). On remand, the Florida court directed the state trial court to vacate Respondent Enmund's death sentences and to impose life sentences. Enmund v. State, __So.2d__ (Fla.1983)(opinion reprinted in the Appendix to Petition for Writ of Mandamus). However, Petitioner claims that this Court's decision did not mandate life sentences for Enmund and that Petitioner is entitled to a new sentencing hearing in the trial court in order to have a second chance to prove that Respondent Enmund took life, attempted to take life or intended that life be taken. Petitioner's position is without

merit. The Supreme Court of Florida's action on remand was a correct application of this Court's opinion.

There are several reasons why Petitioner's claim of entitlement to a new evidentiary sentencing hearing is unfounded. First, Enmund's involvement was fully litigated in the state trial court. The degree of his participation was critical to the question of his guilt or innocence as evidenced by the Supreme Court of Florida's analysis. Enmund v. State, 399 So.2d 1362 (Fla.1981). Additionally, Florida law required litigation of the degree of Enmund's participation for purposes of sentencing. §921.141, Fla.Stat. (1975); State v. Dixon, 283 So.2d 1 (Fla.1973).

A second reason is that the factual issue of the degree of Enmund's involvement was necessarily determined in deciding the issues initially raised in the Supreme Court of Florida. Enmund v. State, 399 So.2d 1362 (Fla.1981). That court concluded:

> There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. J.B. Neal's account of what Sampson Armstrong told him did not include any reference to Enmund. Ida Jean Shaw testified to Enmund's absence that morning and his statements of his complicity. But the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kersey's money.

Ibid., at 1370. In making the above conclusions, the Supreme Court of Florida rejected a portion of the trial court's findings of fact which had concluded that Enmund's involvement was greater because the trial court had based its finding on an impermissible inference. Ibid. Petitioner's dissatisfaction with the Supreme Court of Florida's resolution of this factual matter is the true gravamen of Petitioner's current claim.

The last reason is that Petitioner has consistently maintained that Enmund's degree of participation in the crime was a relevant issue for the jury, the trial court and this

Court to consider in determining the appropriate sentence.[1/] This negates Petitioner's current assertion that it has only now discovered that Enmund's mental state, physical proximity to the scene and other actions were relevant to sentencing. These factual issues have always been relevant in this case and Petitioner has aggressively litigated these matters.

This Court acknowledged the disagreement between the trial court and the Supreme Court of Florida over the evidence of Enmund's participation. Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140,1145 f.n. 2 (1982). However, this Court also recognized that the factual dispute did not have to be resolved by this Court in order to decide the federal constitutional question. Ibid. Consequently, following long standing practice, the Supreme Court of Florida's factual conclusions were accepted Fiske v. Kansas, 274 U.S. 380,385-386 (1927). and the constitutional question was decided on that basis. The direction to the Florida Court stated:

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140,1154 (1982). The Florida Supreme Court, having already resolved the factual disputes in this case and noting that this Court accepted its factual conclusions for purposes of deciding the constitutional question, quite correctly determined that death sentences could

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1/ E.g., Appellee's Supplemental Brief in Enmund v. State, 399 So.2d 1362 (Fla.1981), at 3-13; Brief for Respondent State of Florida in Opposition to Petition for Writ of Certiorari in Enmund v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982), at 13; Brief for Respondent in Enmund v. Florida, supra, at 32-33,44-46,65-67 (E.g.: "Florida's death penalty statute require[s] consideration...[of] the extent of a defendant's participation... in the capital felony").

no longer be imposed on Enmund. Indeed, under these circumstances, a remand for another evidentiary sentencing hearing would have violated this Court's mandate.[2/] See, Bucolo v. Adkins, 424 U.S. 641 (1976).

The Supreme Court of Florida has faithfully followed the directions of this Court. There has been complete compliance with the mandate. No justification exists for the issuance of a writ of mandamus.

[2/] The evidentiary sentencing hearing Petitioner desires would also violate the Fifth and Fourteenth Amendments' proscription against placing a criminal defendant in jeopardy a second time, where there was "a failure of proof"--or, as held in this case an "absence of proof," Enmund v. Florida, __ U.S. __, 73 L.Ed.2d 1140,1145 (1982)--the first time. Burks v. United States, 437 U.S. 1,16 (1978), see, Bullington v. Missouri, 451 U.S. 430,442-443 (1981).

CONCLUSION

Upon the foregoing reasons, Respondent Enmund asks this Court to deny the petition for writ of mandamus.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

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455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

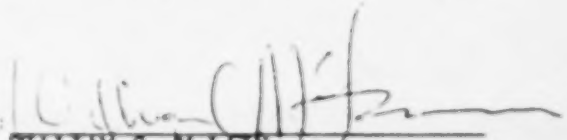
Member Of The Bar Of The United States Supreme Court

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for EARL ENMUND, the Respondent, hereby certify that on December 5, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief in Opposition to Petition for Writ of Mandamus on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Lawrence A. Kaden, Assistant Attorney General, Tallahassee, Florida 32301.

On the Supreme Court of Florida, the Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Sid J. White, Clerk of Supreme Court, Supreme Court Building, Tallahassee, Florida 32304.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

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Case No. 83-788

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE STATE OF FLORIDA,

Petitioner.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Earl Enmund, asks leave to file the attached Brief In Opposition To Petition For Writ Of Mandamus without payment of the costs and to proceed in forma pauperis pursuant to Rule 46. In support of this motion, Respondent states:

1. That he was convicted of first degree murder and robbery in the Circuit Court for Hardee County, Florida.

2. That he received a sentence of death for first degree murder.

3. That he appealed to the Supreme Court of Florida, and that Court affirmed his convictions and sentences.

4. That this Court, on writ of certiorari, reversed the decision of the Supreme Court of Florida affirming his death sentences. Enmund v. Florida, Case No. 81-5321.

5. That on remand, the Supreme Court of Florida directed that his death sentences be vacated and that life sentences be imposed.

6. That the present Petition for Writ of Mandamus filed by the State of Florida is contending that the Supreme Court of Florida did not properly comply with this Court's mandate.

7. That he has been adjudged insolvent and represented throughout his state court appeals by appointed counsel.

8. That he was allowed to proceed in forma pauperis on his Petition for Writ of Certiorari in Enmund v. Florida, Case No. 81-5321.

9. That his financial circumstances has not changed, and his affidavit of insolvency is attached to this motion.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

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455 North Broadway Avenue
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR RESPONDENT,
EARL ENMUND

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

_____

_____

IN RE STATE OF FLORIDA, PETITIONER.

_____

_____

AFFIDAVIT IN SUPPORT OF RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

I, EARL ENMUND, being first duly sworn, depose and say that I am the Respondent in the above-styled case; that in support of my motion to proceed on my Brief in Opposition to Petition for Writ of Mandamus without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the proceedings are true:

1. Are you presently employed? Yes____ No x

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer._____

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1975 - self-employed, fruit harvesting, $ [illegible] per month [illegible]

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No__x__

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

_____

_____

3. Do you own any cash or checking or savings account? Yes____ No__x__

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No__x__

a. If the answer is yes, describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. _____

NONE _____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

_____
Respondent - EARL ENMUND

Subscribed and sworn to
before me this 30 day
of November 19 85.

_____
Notary Public

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for EARL ENMUND, the Respondent, hereby certify that on December 5, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed in Forma Pauperis with attached Affidavit of Insolvency on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Lawrence A. Kaden, Assistant Attorney General, Tallahassee, Florida 32301.

On the Supreme Court of Florida, the Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to Sid J. White, Clerk of Supreme Court, Supreme Court Building, Tallahassee, Florida 32304.

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals